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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: MAY 3 1 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction management services and staffing company. It seeks to employ the beneficiary permanently in the United States as an accountant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established that the beneficiary possessed the requisite educational credentials as set forth on the labor certification and that the petitioner did not demonstrate its ability to pay the proffered wage from the time the labor certification was accepted onwards.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

For the reasons set forth below, the AAO will dismiss the appeal based on a finding of misrepresentation and fraud. As immigration officers USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act) provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).[1] The regulation further states: "A United States baccalaureate degree or a

[1] The petitioner filed a second Form I-140 seeking to sponsor the beneficiary in the same position as an accountant under a lesser classification as a professional or skilled worker. The petitioner incorrectly indicated on the Form I-140 that no "immigrant visa petition [has] ever been filed by or on behalf of this person."

foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

As noted above, the Form ETA 750 in this matter is certified by DOL.[3] DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and

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In addition, the supporting ETA Form 9089 states that the minimum requirements for the position are an associate's degree plus four years of experience as an accountant. Form ETA 750 filed with the instant petition requires a Bachelor's degree plus five years of experience for what appears to be the same position. The ETA Form 9089 does not contain the specific requirement of experience with Wind2 Financial Management Software required by Form ETA 750 in the instant matter. These requirements create ambiguity as to the real requirements of the position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988).

[3]The AAO notes that the beneficiary's passport indicates that his father's surname and the petitioner's owner's surname are the same. It is unclear whether the beneficiary is related to the petitioner. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for a position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

An occupational preference petition may be filed on behalf of a prospective employee who is related to a shareholder in the corporation. The prospective employee's relationship to the shareholder, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of

whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

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his or her familial relationship constitutes willful misrepresentation of a material fact and is a groung for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d). *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). The petitioner must address this issue in any further filings.

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference

> status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Form ETA 750A, Part 14 of the labor certification reflects that four years of college, culminating in a Bachelor's degree in Mathematics or Accounting, is the minimum level of education required in combination with five years of experience in the position offered as an accountant or five years as an accountant with at least one year of experience with Wind2 Financial Management Software.

The petitioner submitted the beneficiary's: 1) Diploma in Computer Science awarded in January 1996 from the National College of Computer Sciences with a corresponding transcript; 2) a Bachelor of Science degree from the University of the Punjab awarded in February 1993 with corresponding examination results; 3) a certificate of Achievement in Accounting Clerk/Computer from ROP North; and 4) confirmation that the beneficiary attended and completed a course in Oracle from Infomate Systems.

It must be herein noted that on April 7, 2011, this office issued a Notice of Derogatory Information (NDI) to both the petitioner and beneficiary[4] pursuant to the provisions of 8 C.F.R. § 103.2(b)(14). The AAO notified the petitioner and the beneficiary of the following:

1) That related to the beneficiary's education, the petitioner submitted a "Pass Result Intimation" for the beneficiary in addition to a Bachelor of Science degree from the University of the Punjab. The diploma states that the beneficiary received a Bachelor of Science in February 1993. The degree does not state a field of study. The Pass Result Intimation has handwritten notations as to the marks obtained by the beneficiary in his subjects. On the Pass Result document, there are several places on which the date is noted, all of which have a printed "198" over which a handwritten "9" appears over the printed "8." Specifically, the Results read: "Candidate mentioned above is hereby informed that he/she has passed the B.Sc. First/Second Annual Examination, 1992, [written over 1982] held in *February* 1993 . . .[which appears to be written over 1983]" (italics indicate handwritten portions). In addition to being internally contradictory, the date of the examination on the Pass Result [1992] conflicts with the bachelor's degree in the record indicating that the examination was held in 1993. The dates on the document appear to be altered (a copy of which was attached to the NDI).
2) The date of the 1992/1993 examination partially conflicts with the letter from Ch. Shahzad, Business Manager for Super C-Mart Stores, who indicates that the beneficiary was employed from January 1992 through March 1996 as listed on the Form ETA 750B, if the beneficiary was working full-time.

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[4] Alien beneficiaries do not normally have standing in administrative proceedings. S*ee Matter of Sano*, 19 I. & N. Dec. 299, 300 (BIA 1985). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. *See Matter of Ho*, 19 I. & N. Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); see also *Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."). However, since a fraud finding affects an alien's admissibility, the AAO permitted the limited participation of the beneficiary to respond to the derogatory information that directly impacts his ability to procure benefits in any future proceedings. *Cf. Matter of Obaigbena*, 19 I. & N . Dec. 533, 536 (BIA 1988). As noted above, however, neither the petitioner or the beneficiary responded.

The petitioner was advised that given the apparent alteration of the documents and misrepresentation of education on which the petitioner and beneficiary rely to claim that the beneficiary qualifies for the position offered, the AAO may enter a finding of misrepresentation or fraud unless the petitioner submitted independent, objective evidence sufficient to overcome the deficiencies outlined in the NDI.

The petitioner was requested to submit a certified copy of the beneficiary's education records from the University of Punjab under University seal.

No response has been submitted by either the petitioner or the beneficiary.[5] Therefore, based on the foregoing, the outlined alterations, lack of any response to the AAO's NDI, and failure to submit any explanation or certified copy as requested to resolve the outlined discrepancies and apparent alteration, this office must conclude that an altered and fraudulent educational document has been submitted in the present case.

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.[6]

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[5] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

[6] If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having "sought to procure" an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary has the required education for the position offered. Submitting false educational documents amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

> (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

A fraudulent educational document suggesting the passage of examinations required for a Bachelor's degree has been submitted in this case. The beneficiary's educational credentials were misrepresented on Form ETA 750 and when the Form ETA 750 was signed by the petitioner and the beneficiary in order to obtain a permanent labor certification application from the Department of Labor. There is no persuasive evidence that the beneficiary possesses the required bachelor's degree to qualify for the petitioner's job opportunity.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The beneficiary's use of a forged or falsified educational document shuts off a

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adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discovers fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with opportunity to respond to the same.

line of relevant inquiry in these proceedings. Before the Department of Labor, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. *See* 20 C.F.R. § 656.17(i). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. *See Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). In addition, DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. *See Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. *See Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the Department of Labor was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the Department of Labor had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the misrepresentation of the beneficiary's educational level was material under the second and third inquiries of *Matter of S & B-C-*.

By misrepresenting his educational background and submitting fraudulent documents to USCIS and making misrepresentations to the Department of Labor on the labor certification, the petitioner and beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility of the beneficiary is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

There has been no response to the AAO's NDI, and, therefore, no dispute that the educational document containing examination results submitted in support of the labor certification is fraudulent. In submitting an altered document, the petitioner sought to theoretically render the beneficiary qualified for the position offered and thereby excluded U.S. workers from an otherwise available position.[7]

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[7]Even if the educational credentials were otherwise authentic, the Form ETA 750 requires 4 years of college culminating in a Bachelor's degree in Mathematics or Accounting followed by five years of experience in the job offered of accountant or five years in a related occupation as specified in Item 15 of the Form ETA 750. There are no equivalencies specified, or any that would be allowed based on the visa category selected, for the required education of 4 years in college. As presented, the beneficiary's bachelor's degree represents the U.S. equivalent of no more than two years of college.

As noted above, section 203(b)(2) of the Immigration and Nationality Act (the Act) provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.* In this case, as the beneficiary does not possess the foreign equivalent of a U.S. Bachelor's degree in Mathematics or Accounting, he cannot be found to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

Additionally, the petitioner has also failed to establish its ability to pay the $49,316 annual proffered wage as of the March 19, 2004, priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage. If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967). *See also River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the petitioner did not pay the beneficiary the full proffered wage in 2004 or 2005, and neither its net income of -$4,956 in 2004 and $438 in 2005, nor its net current assets of -$5,736 in 2004 and -$5,298 in 2005 were sufficient to cover the difference between actual wages of $33,861.12 (2004) and $47,005.90 (2005) paid to the beneficiary and the proffered wage. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets. Accordingly, after considering the

As noted above, it is proper for the AAO to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The AAO specifically issued the notice to both the petitioner and the beneficiary to permit a response or submit evidence to overcome the alleged misrepresentation. No response was received disputing the material alterations.

By signing Forms ETA 750, and submitting a falsified educational document, the petitioner and beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because no response containing independent and objective evidence that would overcome our finding was received, this finding is affirmed. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

ORDER: The appeal is dismissed with a finding of fraud and willful misrepresentation of a material fact.

FURTHER ORDER: The AAO finds that the petitioner and beneficiary fraudulently misled DOL and USCIS on elements material to the eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the fraudulent misrepresentation.

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petitioner's overall circumstances, it has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.